



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
April 15, 2016

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

\* \* \* \* \*

In re:	)	Case No. 12-12508-MKN
	)	Chapter 7
LYNN C. BURKE,	)	
	)	Date: March 30, 2016
Debtor.	)	Time: 1:30 p.m.

**ORDER ON EX PARTE MOTION TO REOPEN BANKRUPTCY CASE FOR THE PURPOSE OF RETROACTIVELY ANNULLING THE AUTOMATIC STAY<sup>1</sup>**

On March 31, 2016, the court heard the Ex Parte Motion to Reopen Bankruptcy Case for the Purpose of Retroactively Annuling the Automatic Stay (“Annulment Motion”) (ECF No. 37) brought on behalf of K&P Homes, a series LLC of DEK Holdings, LLC (“K&P”).<sup>2</sup> The appearances of counsel were noted on the record. After oral arguments were presented, the matter was taken under submission.

**BACKGROUND**

On March 6, 2012, Lynn C. Burke (“Debtor”) filed a voluntary Chapter 7 bankruptcy

<sup>1</sup> In this Order, all references to “ECF No.” are to numbers assigned to the documents filed in the case as they appear on the docket maintained by the clerk of the court. All references to “Section” or “§” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532, unless otherwise indicated.

<sup>2</sup> K&P’s instant motion incorrectly identifies the real party in interest as NV Eagles, LLC, see Annulment Motion at 1:18, which was represented by the same law firm that brought a similar motion in a prior proceeding in this district, In re Haddad, Case No. 11-13184-MKN. In that proceeding, the court entered an order annulling the automatic stay. (Haddad ECF No. 36).

1 petition and required schedules of assets and liabilities. (ECF No. 1). On her Schedule “A,”  
2 Debtor listed a residence located at 7461 Glimmering Sun Avenue, Las Vegas, Nevada 89178  
3 (“Property”) and further indicated that the Property was to be surrendered. Debtor listed the  
4 Property as having a value of \$160,000.00 and subject to a secured claim in the total amount of  
5 \$324,000.00. On her Schedule “D,” Debtor listed Bank of America (“BOA”) as a secured  
6 creditor with a claim against the Property in the amount of \$324,000.00 that was secured by a  
7 first mortgage. Debtor’s Schedule “D” also listed two homeowner associations, Mountains Edge  
8 Master Association (“MEMA”) and Tuscalante, both as secured creditors against the Property  
9 each having a claim in the amount of \$0.00. Debtor’s Statement of Intention indicated her intent  
10 to surrender the Property to BOA, MEMA, and Tuscalante. The case was assigned for  
11 administration to Chapter 7 trustee, Lenard Schwartz (“Trustee”).

12 On April 13, 2012, the Debtor amended her Schedule “D” to list a claim held by Rita  
13 Wiegand (“Wiegand”), secured against the Property<sup>3</sup> in the amount of \$0.00, with the only basis  
14 for Wiegand’s interest stated as “PMSI.” (ECF No. 17). Debtor’s Amended Schedule “D” did  
15 not change the other secured claims nor the amounts originally listed for BOA, MEMA, or  
16 Tuscalante.

17 On June 11, 2012, the Order granting Debtor’s Chapter 7 discharge was entered. (ECF  
18 No. 32). The Debtor’s Chapter 7 case, however, remained open.

19 On July 31, 2012, Tuscalante recorded a Notice of Delinquent Assessment Lien with the  
20 Clark County Recorder as Instrument No. 20120731:0002531.<sup>4</sup> See Annulment Motion at ¶ 11.

21 \_\_\_\_\_  
22 <sup>3</sup> K&P contends that in July of 2007, Rita Wiegand obtained title to the Property through  
23 a Grant Bargain Sale Deed. The Property was financed through Universal American Mortgage  
24 Company, LLC and a Deed of Trust was recorded in the Clark County official records as  
25 Instrument No. 20070725:005226. Two months later, Ms. Wiegand added her daughter, the  
26 Debtor, to the Property title via Quitclaim Deed, recorded as Instrument No. 20071003:0001902.  
27 See Annulment Motion at ¶ 2. The Deed of Trust was transferred from Universal to BAC Home  
Loan on October 20, 2009 and recorded as Instrument No. 20091020:0002000 and thereafter  
transferred to Bank of America. *Id.* at ¶ 5. Bank of America was notified of the bankruptcy  
filing and appears on the creditor’s matrix that accompanied the bankruptcy petition.

28 <sup>4</sup> Only one opposition to the Annulment Motion was filed. That opposition was filed on  
March 14, 2016 by Christiana Trust, a division of Wilmington Savings Fund Society, FSB, not in

1 On August 6, 2012, the Final Decree closing the bankruptcy proceeding was filed. (ECF  
2 No. 36).

3 On September 20, 2012, Tuscalante recorded a Notice of Default and Election to Sell  
4 Under Homeowners Association Lien with the Clark County Recorder as Instrument No.  
5 20120922:0001177. See Annulment Motion at ¶ 13. The Notice of Default and Election to Sell  
6 was mailed by certified mail to all parties of interest. Id.

7 On May 7, 2013, a Notice of Foreclosure Sale was recorded in the office of the Clark  
8 County Recorder as Instrument No. 20130507:0000897. See Annulment Motion at ¶ 14. A  
9 copy of this Notice was also served on all interested parties including Bank of America. Id.

10 On May 31, 2013, nine months after the bankruptcy proceeding was closed, a foreclosure  
11 sale was conducted, and the Property was purchased by K&P for \$40,000.00. See Annulment  
12 Motion at ¶ 15. On June 4, 2013, the Foreclosure Deed was recorded in the Office of the Clark  
13 County Recorder as Instrument No. 20130604:0000600. Id.

14 On January 15, 2014, Bank of America transferred the Property to the Christiana Trust.  
15 See Annulment Motion at ¶ 17.

16 On August 12, 2015, the Christiana Trust filed a complaint to quiet title and for  
17 declaratory relief in the United States District Court for the District of Nevada, Case No. 2:15-  
18 cv-01534-RCJ-VCF alleging that the sale was void, *inter alia*, as commercially unreasonable  
19 (“Federal Case”). See Annulment Motion at ¶ 18. A potential violation of the automatic stay  
20 was not alleged in this complaint, and K&P was the only named defendant. Id. K&P filed a  
21 third-party complaint against the prior owners, Rita Wiegand and the Debtor, to resolve all  
22 potential claims against the Property. Id. at ¶ 19.

23 On February 15, 2016, Christiana Trust identified a potential violation of the automatic  
24 stay of the bankruptcy proceeding as a potential claim/defense in the Federal Case. See  
25 Annulment Motion at ¶ 20. K&P was not previously aware of the bankruptcy issue and searched

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27 its individual capacity but as Trustee of ARLP Trust 3 (“Christiana Trust”) (“Opposition”).  
28 (ECF No. 42). None of the facts argued in the Annulment Motion are disputed by Christiana  
Trust in its Opposition.

1 the bankruptcy system to locate the Debtor's instant bankruptcy case. Id. After discovering the  
2 Debtor's bankruptcy case, K&P filed the current Annulment Motion seeking relief from the  
3 automatic stay retroactive to the date of the Debtor's discharge on June 11, 2012. Id.

4 On February 22, 2016, the instant Annulment Motion was filed.

5 On February 23, 2016, an Order was entered reopening the bankruptcy proceeding and  
6 requiring the Annulment Motion to be noticed for hearing. (ECF No. 39).

7 On February 24, 2016, a Notice of Hearing was filed to set a hearing on K&P's request to  
8 annul the automatic stay. (ECF No. 40).

9 On March 14, 2016, Christiana Trust filed its Opposition to the Annulment Motion.  
10 (ECF No. 42). No Opposition was filed by the Chapter 7 Trustee ("Trustee"). K&P did not file  
11 a reply to the Opposition.

## 12 DISCUSSION

13 Upon the filing of a bankruptcy petition, the automatic stay arises under § 362 that  
14 prohibits actions against both the debtor and property of the bankruptcy estate. Prohibited  
15 activities include "any act to obtain possession of property of the estate . . . or to exercise control  
16 over property of the estate." 11 U.S.C. § 362(a)(3). Prohibited acts also include "any act to  
17 create, perfect, or enforce any lien against property of the estate." 11 U.S.C. § 362(a)(4).  
18 Actions taken in violation of the automatic stay are *void ab initio* and have no effect. See United  
19 States v. Schwartz (In re Schwartz), 954 F.2d 569, 572-73 (9th Cir. 1992). Under § 541(a)(1),  
20 property of a bankruptcy estate includes any property in which the debtor has a legal or equitable  
21 interest as of the petition date. Under § 554(c), property of a bankruptcy estate that is not  
22 administered by the bankruptcy trustee is deemed abandoned ("administratively abandoned") at  
23 the time the bankruptcy case is closed.

24 Under § 362(c)(1), the stay of an act against property of the bankruptcy estate continues  
25 until the property is no longer property of the estate, unless relief from stay is granted by the  
26 court. Under § 362(c)(2)(C), the automatic stay terminates as to an individual chapter 7 debtor at  
27 the time the discharge is granted. See In re Henry, 266 B.R. 457, 474 (Bankr. C.D. Cal. 2001).

28 Under § 362(d), relief from the automatic stay may be granted by terminating, annulling,

1 modifying or conditioning the stay. Under § 362(d)(1), relief from the stay may be obtained on a  
2 showing of cause. Because relief may be granted in the form of annulling the automatic stay,  
3 retroactive relief from stay is permitted. See Fjeldsted v. Lien (In re Fjeldsted), 293 B.R. 12, 21  
4 (B.A.P. 9th Cir. 2003), citing, In re Schwartz, 954 F.2d at 572-73.

5 In this case, the Property was property of the Debtor's bankruptcy estate at the time the  
6 Chapter 7 Petition was filed. The Trustee never sought court authorization to sell nor abandon  
7 the Property.

8 The bankruptcy case was closed by Final Decree entered on August 6, 2012. Closure of  
9 the case resulted in the administrative abandonment of the Property on that date.<sup>5</sup>

10 Prior to the case closure, the Property remained property of this bankruptcy estate. Under  
11 § 362(c)(1), the automatic stay protected the estate's interest in the Property. When the  
12 Discharge Order was entered on June 11, 2012, the automatic stay only terminated as to the  
13 Debtor, but remained with respect to all property of the Debtor's bankruptcy estate.

14 There is no dispute that, when Tuscalante recorded its Notice of Delinquent Assessment  
15 Lien with the Clark County Recorder's Office on July 31, 2012, it had not obtained relief from  
16 the automatic stay. Issuing the Notice of Delinquent Assessment Lien, as well as recording it,  
17 clearly were acts to create, perfect, or enforce the HOA lien under § 362(a)(4) as a step to obtain  
18 possession of and exercise control over estate property under § 362(a)(3). These actions violated  
19 the automatic stay and were, therefore, void.

20 K&P seeks an order annulling the stay to the date of the Debtor's Discharge Order, i.e.,  
21 June 11, 2012. Annulling the stay ". . . has the effect of retroactively validating acts that  
22 otherwise violated the stay." See Lonestar Sec. & Video, Inc. v. Gurrola (In re Gurrola), 328  
23 B.R. 158, 172 (B.A.P. 9th Cir. 2005). Whether "cause" exists to annul the stay is determined  
24 under a "balancing of the equities" test. Id. Relevant factors considered in making this  
25 determination include the extent of prejudice to the parties involved, including harm to a bona

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27 <sup>5</sup> Although the foreclosure sale of the Property on May 31, 2013 did not occur until after  
28 the case was closed, Tuscalante initiated the foreclosure process by sending and recording the  
Notice of Delinquent Assessment Lien prior the to Trustee administratively abandoning the  
estate assets by closing the case.

1 fide purchaser and relative ease of restoring parties to the status quo; the costs of annulment to  
2 the debtor and creditors; how quickly the parties moved for annulment; and whether stay relief  
3 will promote judicial economy or other efficiencies. See In re Fjeldsted, 293 B.R. at 25. These  
4 factors simply provide an analytical framework and any one factor may be dispositive in  
5 comparison to the others. Id. Thus, determining whether annulment is proper, is made on a  
6 case-by-case basis. See Nat'l Envtl. Waste Corp. v. City of Riverside (In re Nat'l Envtl. Waste  
7 Corp.), 129 F.3d 1052, 1055 (9th Cir. 1997).

8 Christiana Trust first argues that retroactive relief from the stay violation committed by  
9 Tuscalante is being sought by K&P as a “benefactor” and not by the HOA, the actor who  
10 committed them. See Opposition at 5:7-8. Christiana Trust argues that a “benefactor,” as used  
11 in this sense, does not mean a “bona fide purchaser,” which status was rejected as cause by the  
12 Fjeldsted court in deciding whether to grant retroactive relief from the automatic stay. See  
13 Fjeldsted, 293 B.R. at 26. Christiana Trust then asserts an opposite argument concluding that  
14 the request to annul the stay is unsupported by cause in light of the intentional violations of both  
15 § 362(a) and § 727(b) by a *creditor* of the estate. See Opposition at 6:1-3. In this case, however,  
16 K&P did not violate, intentionally or otherwise, either § 362(a) or § 727(b), as it did not initiate  
17 the foreclosure sale, is not an affiliate of Tuscalante, and is not a creditor of the Debtor.

18 Christiana Trust also argues that the relief sought in the Annulment Motion does not  
19 provide any benefit to the Debtor, but rewards parties not before the court for their willful stay  
20 violation. See Opposition at 2:18-19. This court disagrees.

21 K&P purchased the Property at the foreclosure sale initiated by Tuscalante while the  
22 automatic stay was still in place, but the sale was conducted after the Debtor’s case was closed.  
23 Despite the violation of the automatic stay by Tuscalante, various factors militate in favor of  
24 annulling the stay, including the prejudice to K&P and the prejudice to the Debtor. K&P did not  
25 have notice of the bankruptcy filing and was not a creditor of the Debtor. K&P also was not put  
26 on notice of the bankruptcy proceeding at the time of the foreclosure sale, because the Debtor  
27 had been discharged and the case had been closed. K&P was not put on notice of the bankruptcy  
28 filing until February 15, 2016, after the Federal Case was filed, when the potential issue was

1 raised for the first time by the Christiana Trust.

2 If the automatic stay is not annulled, K&P will lose any monies expended for the  
3 purchase, repair, maintenance, and upkeep of the Property, and potentially incur additional  
4 expenses. K&P was diligent in filing its Annulment Motion once the Christiana Trust raised the  
5 potential stay violation in the course of the Federal Case. Adjudication of the applicability of the  
6 automatic stay and relief therefrom in the bankruptcy court promotes judicial economy and  
7 efficiency.

8 Equally and perhaps more important, is the Debtor's fresh start. If annulment of the stay  
9 is not granted and the foreclosure sale is void, title to the Property is legally restored in the  
10 Debtor's name despite the Debtor's previously stated intention to abandon and surrender any  
11 interest in the Property. Restoration of title also would restore the liens against the Property.  
12 Those liens survived the bankruptcy even though the Debtor's personal liability for the  
13 underlying debt was discharged. Debtor does not reside in the Property and presumably has not  
14 lived in the Property for years. Debtor received a Chapter 7 discharge on June 11, 2012, thereby  
15 commencing the "fresh start" that bankruptcy is designed to provide honest but unfortunate  
16 individual debtors. Absent retroactive relief from stay, Debtor would be faced with holding title  
17 to real property for which the Debtor would be in payment default for over three years with  
18 almost certain foreclosure to follow. The resulting damage to the Debtor's fresh start occasioned  
19 by a foreclosure or other disposition title cannot be ignored by this court, even if the other parties  
20 to this dispute would rather do so. Allowing non-debtor parties to assert the protections of the  
21 automatic stay to the potential detriment of the Debtor simply invites manipulation of the fresh  
22 start policies of bankruptcy relief.

23 Finally, no opposition to the requested relief has been presented by the Trustee. To the  
24 extent the recordation of the Notice of Delinquent Assessment Lien caused any damage to the  
25 bankruptcy estate, the Trustee arguably would be able to pursue such damages under § 105(a).  
26 See In re H. Granados Communications, Inc., 503 B.R. 726, 733 (B.A.P. 9th Cir. 2013)  
27 (corporation ineligible to seek automatic stay sanctions under 362(k) may seek sanctions under  
28 105(a)); Havelock v. Taxel (In re Pace), 56 F.3d 1170, 1175-76 (9th Cir. 1995) (Chapter 7

1 trustee is not an individual under 362(h) who can seek sanctions for violation of automatic stay).  
2 In this instance, the Trustee had notice of the Annulment Motion, could have opposed retroactive  
3 relief, and did not. Thus, both natural enemies of relief from the stay violation, i.e., the Debtor  
4 and the Trustee, do not oppose the relief requested by K&P.

5 In short, the arguments of the Christiana Trust are outweighed by the concerns of the  
6 court, the prejudice to K&P and the Debtor, and judicial economy. Based on the record in this  
7 proceeding, together with materials presented and arguments of counsel, the court concludes that  
8 cause exists to grant K&P's request to annul the automatic stay.

9 **IT IS THEREFORE ORDERED** that the Ex Parte Motion to Reopen Bankruptcy Case  
10 for the Purpose of Retroactively Annulling the Automatic Stay, Docket No. 37, be, and the same  
11 hereby is, **GRANTED**.

12 **IT IS FURTHER ORDERED** that the automatic stay with respect to real property  
13 located at 7461 Glimmering Sun Avenue, Las Vegas, Nevada 89178 is **ANNULLED** as of **June**  
14 **11, 2012**.

15 Copies sent to all parties via BNC

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